

## UNITED STATES DISTRICT COURT

## DISTRICT OF NEVADA

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DAVID KLUCKA,

Case No. 2:15-cv-02108-JAD-PAL

Plaintiff,

v.

**ORDER**

SUSAN ATKINSON, et al.,

(IFP App. – Dkt. #1)

Defendants.

This matter is before the Court on Plaintiff David Klucka's Application to Proceed *In Forma Pauperis* (Dkt. #1). This Application is referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(A) and LR IB 1-3 and 1-7 of the Local Rules of Practice.

Mr. Klucka is a pretrial detainee in the custody of the Clark County Detention Center, and he proceeding in this action *pro se*. He has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 and requested permission to proceed *in forma pauperis* ("IFP"), meaning without prepaying the full \$400.00 filing fee.<sup>1</sup> See Pl.'s Compl. (Dkt. #1-1); IFP App. (Dkt. #1). However, on at least three (3) occasions, this Court has dismissed civil actions that Mr. Klucka commenced while in detention as frivolous or for a failure to state a claim upon which any relief may be granted. See *Klucka v. Lippis*, Case No. 2:05-cv-01285-JCM-GWF (D. Nev. Nov. 29, 2006) (dismissing § 1983 claims against justice of the peace and deputy district attorney, who had absolute immunity from such claims); *Klucka v. Barker*, Case No. 2:15-cv-02162-JAD-NJK (D. Nev. Dec. 8, 2015) (dismissing § 1983 claims with prejudice against appointed counsel and investigator, who were not state actors); *Klucka v. Powell*, Case No. 2:15-cv-01609-RCJ-NJK

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<sup>1</sup> Pursuant to the Court's Schedule of Fees dated January 1, 2015, the administrative fee of \$50.00 does not apply to persons granted *in forma pauperis* status under 28 U.S.C. § 1915. However, when the Court denies a plaintiff *in forma pauperis* status, the full \$400.00 filing fee applies.

1 (D. Nev. Jan. 5, 2016) (dismissing § 1983 claims with prejudice against appointed counsel and  
2 investigator, who were not state actors); *Klucka v. Almase*, Case No. 2:15-cv-01658-RFB-PAL  
3 (D. Nev. Feb. 17, 2016) (dismissing § 1983 claims with prejudice against appointed counsel,  
4 who was not a state actor).<sup>2</sup> Pursuant to 28 U.S.C. § 1915(g), “if [a] prisoner has, on 3 or more  
5 prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a  
6 court of the United States that was dismissed on the grounds that it is frivolous, malicious, or  
7 fails to state a claim upon which relief may be granted,” he may not proceed IFP and, instead,  
8 must pay the full \$400.00 filing fee in advance unless he is “under imminent danger of serious  
9 physical injury.”

10 In this case, Mr. Klucka alleges that Defendants acted as partners in a conspiracy, as  
11 agents of the police, to produce a doctored surveillance video. *See generally* Pl.’s Compl.  
12 (Dkt. #1-1). Although his Complaint names 31 Defendants in total, Klucka makes no specific  
13 allegations against any Defendants other than Powell and Logan. *See generally* Pl.’s Compl.  
14 (Dkt. #1-1) (naming Defendants Susan Atkinson, LaTrina Bulter, Irene Contreras, Mich  
15 Eddington, Stephanie Gherardin, Nathan Gilbert, Stacey Gonzalez, Bill Herndon, Joel Logan,  
16 Semyon Ostrovsky, Jonathan Powell, Randall Rego, James Rowe, Brian Swartwood, the D  
17 Casino, the Las Vegas Metropolitan Police Department, and John Does #1–#15). Mr. Klucka  
18 asserts that his appointed defense counsel, Defendant Jonathan Powell, “committed the crime of  
19 coercion” against him by refusing to show the original surveillance video at his preliminary  
20 hearing, withholding evidence from the court, and refusing to remove himself from Klucka’s  
21 case, among other alleged misdeeds. *Id.* at 13–14. Mr. Klucka further alleges that Powell had  
22 his investigator, Defendant Joel Logan, show Klucka a doctored video. *Id.* at 14.

23 The Court finds that these allegations fail to plausibly allege that Mr. Klucka is in  
24 imminent danger of serious physical injury. *See Andrews v. Cervantes*, 493 F.3d 1047, 1055 (9th  
25 Cir. 2007) (holding that the exception to § 1915(g) applies if the complaint makes a plausible  
26 allegation that the prisoner faced imminent danger of serious physical injury at the time of  
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28 <sup>2</sup> The Court takes judicial notice of its prior records in the above matters.

1 filing). Thus, to proceed in this case, Klucka will be required to pay the full \$400 filing fee and  
2 submit an amended complaint by June 3, 2016. The amended complaint must correct his failure  
3 to state a claim upon which relief may be granted.

4 First, Mr. Klucka may not bring a § 1983 action against Defendants Powell and Logan  
5 because they are not state actors. Mr. Klucka has filed several complaints in the past making  
6 very similar, unmeritorious allegations, including a previous § 1983 action against Defendants  
7 Powell and Logan based on conduct that occurred in relation to Klucka's criminal proceeding.  
8 *See Klucka v. Powell*, Case No. 2:15-cv-01609-RCJ-NJK. In that case, District Judge Robert C.  
9 Jones adopted the Report and Recommendation (Dkt. #10) by Magistrate Judge Nancy J. Koppe,  
10 which recommended dismissal with prejudice because neither Defendants Powell nor Logan are  
11 state actors. *See id.* (citing *Polk County v. Dodson*, 454 U.S. 312, 318–19 & n.7 (1981) (“It is  
12 well established that attorneys, whether retained or appointed, do not act ‘under color of state  
13 law’ in representing a plaintiff in a criminal proceeding.”)). Here, Mr. Klucka is also alleging that  
14 Defendants Powell and Logan violated his rights based on conduct that occurred in relation to  
15 Klucka's criminal proceeding. *See Pl.'s Compl.* (Dkt. #1-1). The case law clearly demonstrates  
16 that Mr. Klucka may not bring a § 1983 action against Defendants Powell and Logan. Thus, the  
17 allegations against Powell and Logan fail to state a claim upon which relief may be granted.

18 Second, the remainder of the Complaint fails to state a valid claim based on the absence  
19 of specific allegations against 29 of the 31 Defendants. As the Ninth Circuit opined in *Hydrick*  
20 *v. Hunter*, 669 F.3d 937 (9th Cir. 2012), a plaintiff must plead that each defendant, through their  
21 “own individual actions, has violated the Constitution” to establish liability under 42 U.S.C.  
22 § 1983. *Id.* at 941. The absence of specific allegations is significant because a plaintiff must  
23 allege sufficient facts to “plausibly establish” the defendants’ “‘knowledge of’” and  
24 “‘acquiescence in’” the unconstitutional conduct. *Id.* (citing *Starr v. Baca*, 652 F.3d 1202, 1206–  
25 07 (9th Cir. 2012)). Therefore, the allegations against the remaining Defendants fail to state a  
26 plausible claim.

27 If Mr. Klucka chooses to file an amended complaint, he must do so by June 3, 2016. He  
28 is advised to support each of his claims with factual allegations, because all complaints “must

1 contain sufficient allegations of underlying facts to give fair notice and to enable the opposing  
2 party to defend itself effectively.” *Starr*, 652 F.3d at 1216. Mr. Klucka should specifically  
3 identify each Defendant to the best of his ability, clarify what constitutional right he believes  
4 each Defendant has violated and support each claim with factual allegations about each  
5 Defendant’s actions. The amended complaint should set forth his claims in short and plain  
6 terms, simply, concisely and directly. *See Swierkeiewicz v. Sorema N.A.*, 534 U.S. 506, 514  
7 (2002); Fed. R. Civ. Pro. 8.

8 Mr. Klucka is also informed that the Court cannot refer to a prior pleading (*i.e.*, the  
9 original complaint) in order to make the amended complaint complete. Local Rule 15-1 requires  
10 that an amended complaint be complete in itself without reference to any prior pleading. *See D.*  
11 *Nev. LR 15-1(a)* (amended May 1, 2016). This is because, as a general rule, an amended  
12 complaint supersedes the original complaint. *Ramirez v. Cty. of San Bernardino*, 806 F.3d 1002,  
13 1008 (9th Cir. 2015); *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010) (quoting *Loux v.*  
14 *Rhay*, 375 F.2d 55, 57 (9th Cir. 1967), and explaining, “when a plaintiff files an amended  
15 complaint, ‘the amended complaint supercedes the original, the latter being treated thereafter as  
16 non-existent’ ”). Once a plaintiff files an amended complaint, the original pleading no longer  
17 serves any function in the case. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).  
18 Therefore, in an amended complaint, as in an original complaint, each claim and the involvement  
19 of each defendant must be sufficiently alleged.

20 For the foregoing reasons,

21 **IT IS ORDERED:**

- 22 1. Plaintiff David Klucka’s Application to Proceed *In Forma Pauperis* (Dkt. #1) is  
23 DENIED. To proceed in this case, Mr. Klucka is required to pay the \$400 filing fee  
24 before **June 3, 2016**.
  - 25 2. The Clerk of the Court SHALL FILE the Complaint (Dkt. #1), but SHALL NOT  
26 issue summons.
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- Dated this 4th day of May, 2016.

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